COVER SHEET

CIVIL LIABILITY REFORM AND THE NOT FOR PROFIT SECTOR IN AUSTRALIA

Abstract

Legislative policy, underpinned by public sentiment, has traditionally sought to encourage philanthropy, charity and volunteer work, by some measure of legal protection for those engaged in such activities. Statutory initiatives in the area of civil liability reform have widened in general the ambit of this legislative protection for non-profit organisations and individuals engaged in philanthropic works.

These legislative reforms have been implemented throughout Australia.[1] The focus of this paper are those statutory provisions on civil liability, particularly relevant to the non-profit sector.

INTRODUCTION

The impetus for widespread civil liability reform in Australia has had its genesis in the increased volume of tort litigation for negligence and large damage awards. Underpinning the volume of this litigation have been factors such as speculative actions by lawyers; an increased awareness by the public through media coverage of their rights to sue for negligence and potentially large damage awards. Furthermore, courts have opened the door to claims, not just for personal injury or property damage, but also to purely financial loss (e.g. negligent financial advice causing economic loss). A greater awareness in the community of a right to sue for negligence has led to class actions for mass torts such as

[1] Civil Liability Act 2003 (Qld), Law Reform Act 1995 (Qld);Civil Liability Act 2002 (NSW); Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic); Civil Liability Act 2002 (WA) ;Volunteers (Protection From Liability) Act 2002 (WA); Civil Liability Act 2002 (Tas) ; Civil Liability Act 1936 (SA) ;Volunteers Protection Act 2001 (SA); Personal Injuries (Liabilities and Damages) Act 2003 (NT) ; Civil Law (Wrongs) Act 2002 (ACT) ; Volunteers Protection Act 2003 (Cwth); Workplace Relations Amendment Act 2003 (Cwth).

environmental pollutants, defective products, etc. The result of this litigation has been an unworkable increase in premiums for liability insurance and/or the withdrawal of insurers from this area altogether. Reaction of the insurance industry has been motivated in part by actuarial evidence of potential risk. Consequently, governments and courts have reacted to an ever-increasing burden placed on the community, with the former (governments, State and Federal) implementing statutory reforms limiting the scope of civil liability and the courts adopting in the public interest a more restrictive attitude to plaintiffs, both on liability issues and the quantum of awards in negligence litigation.

As part of this legislative reform process, governments have additionally focussed on statutory protection from civil liability for those who are involved in philanthropic, charitable or community work.

Below, the State and Federal statutory provisions relevant to the non-profit sector are highlighted and discussed. These provisions are generally consistent across jurisdictions. Minor variations in the legislative drafting are not highlighted, but substantial differences are discussed.

OBVIOUS RISK; INHERENT RISK AND DANGEROUS RECREATIONAL ACTIVITIES[2]

The legislative intention with respect to obvious risks, inherent risks and dangerous recreational activities is to reduce the opportunity for negligence litigation where persons voluntarily participate in dangerous activities involving obvious or inherent risks. This is recognition by parliament that individuals should assume not only a moral responsibility but a legal responsibility for their own actions and choices.

[2] Civil Liability Act 2003 (Qld) ss 13-19 ; Civil Liability Act 2002 (NSW) ss5F-5N ; Civil Liability Act 2002 (WA) ss5E-5J,5M-5P ; Civil Liability Act 2002 (Tas) ss15-20,s39; Civil Liability Act 1936 (SA) ss36-39.

The legislation draws a distinction between an “obvious risk” and an “inherent risk”. An “obvious risk” is “a risk that would , in the circumstances, have been obvious to a reasonable person in the position of that person” and includes risks that are patent or a matter of common knowledge. A risk can be an obvious risk even if the risk is not prominent, conspicuous or physically observable. An obvious risk would include a person entering a motor vehicle as a passenger with a driver who is obviously intoxicated and incapable of properly controlling the motor vehicle. However, this would not come within the definition of an “inherent risk”, the latter being “a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill”. There is an inherent risk of personal injury in playing a body contact sport such as rugby.

Clubs, associations and societies and their employees and volunteers, when organising and supervising recreational activities involving inherent danger of physical harm, cannot be sued by a participant who suffers harm from the materialisation of that inherent or obvious risk.

Example 1

A show society stages a rodeo and invites anyone over the age of 18 to participate in the event. X enters the bullride which involves riding on a wild bull. X falls from the bull and is immediately trampled on by the bull thereby incurring fractures to the bones in his legs. The show society had taken all normal precautions to prevent injury in the bullride event.

Riding on a bull in such an event involves an inherent risk and an obvious risk of injury and is a dangerous recreational activity and the injury to the rider occurred through the materialisation of that inherent and obvious risk and not through any specific negligent act or omission on the part of anyone. Consequently, there is no civil liability attaching to the show society or its employees or volunteers.

Example 2

X is a trained volunteer fire-fighter attached to a registered bush fire fighting unit. X is called out to fight a large bush fire. Due to unforeseen wind variations, X is caught in a fire and receives severe burns, despite wearing all protective clothing and equipment.

(In this scenario, X cannot sue, in any civil proceedings, the fire fighting unit, or the government or anyone else since the injuries to X were the result of the materialisation of an inherent risk involved in fire fighting.

While of little consolation to X, he himself could not be sued for negligence while acting in good faith during emergency operations. [see below for legislative protection of emergency workers and volunteers.])

Where a participant in a dangerous recreational activity suffers harm as a result of carelessness by an employee or volunteer of the non-profit organisation, that organisation may be potentially liable for such negligence since the harm has been caused neither by the materialisation of an "inherent risk" or an "obvious risk" (as defined under the legislation). The injury has been caused by specific negligence.

Example 3
A show society stages a bullride organised by the society and an employee or volunteer, whose task it is to secure the equipment on each bull before each ride, inadvertently fails to tighten a strap sufficiently, thereby causing the rider to fall backwards as the bull is released. The rider suffers head injuries.

The society itself could be liable, either through specific legislative provision making the organisation vicariously liable for the acts of a volunteer or under normal principles of vicarious liability or agency. (except in New South Wales).

If it was a volunteer who carelessly failed to tighten the strap, this volunteer would be protected under specific legislation from personal civil liability (see below in this paper for volunteers' protection).

Clubs, societies or associations that conduct recreational activities involving risks to participants, can under some State civil liability legislation[3] give a warning of the risk and thereby negate any duty of care to a participant who suffers harm as a result of the materialisation of that risk. A "risk warning" is one that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The organisation giving the "risk warning" is not required to establish that the person harmed actually received or understood the warning providing there was reasonable notice.

[3] Civil Liability Act 2002 (NSW) s5M ; Civil Liability Act 2002 (WA) s5I ; Civil Liability Act 2002 (Tas) s39.

Some States have not provided for such a risk warning in their civil liability legislation.[4] But this would not prevent such a warning being given and a potential defence of voluntary assumption of risk arising to protect the organisation from civil liability.

Example 4
An outdoors and hiking club organises regular visits for its members to a waterhole and picnic area leased by the club. The club has placed 3 signs at strategic and obvious points of entry into the waterhole that warn members of the varying depths of water and warning that only strong swimmers should swim in the waterhole. A club member who fails to read the signs and who was not a strong swimmer drowned in the deep water. Dependants of the drowned person sue the club.

(The club would not owe a duty of care to the deceased member and consequently the dependants' action would fail).

EMERGENCY ASSISTANCE – GOOD SAMARITANS [5]

Where a person in good faith and without expectation of payment comes to the assistance of a person who is apparently injured or at risk of being injured, no civil liability is incurred by the person providing such emergency assistance.

This protection from civil liability may not apply in some States if there has been recklessness by the person offering assistance, or such person was negligent due to the effect of alcohol or drugs, or was impersonating a health care or emergency worker or police officer, or misrepresenting they had skills or expertise in rendering the emergency assistance.

The Civil Liability Act in Queensland deserves special mention with respect to emergency assistance. The Queensland provisions provide no statutory protection from civil liability for

[4] Qld and SA.
[5] Civil Liability Act 2003 (Qld) ss25-27 ;Law Reform Act 1995 (Qld) PartV; Civil Liability Act 2002 (NSW) ss55-58; Civil Liability Act 1936 (SA) s74 ; Civil Liability Act 2002 (WA) ss5AB-5AE ; Wrongs Act 1958 (Vic) Part VIA; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s8; Civil law (Wrongs) Act 2002 (ACT) s8 ; see also Workplace Relations Amendment Act 2003 (Cwth) .

the passer-by who voluntarily offers emergency assistance. In fact, it might be suggested the Queensland legislation positively discourages the "good samaritan" since the threat of litigation for negligence may deter the passer-by from any involvement. The Queensland provisions provide for statutory protection from civil liability only for medical practitioners, nurses or other prescribed emergency workers, or persons performing such emergency duties for an entity prescribed under statute that provides services to enhance public safety.

Example 5
Q is driving home from a party at 1 am and is first to arrive at the scene of a serious motor vehicle collision. When Q arrives at the scene, S one of the occupants of the damaged vehicle is lying on the carriageway. The accident scene is not well lit and Q acting in good faith, instinctively moves S off the carriageway believing that S is in further danger of being struck by other vehicles using the carriageway. S suffered spinal injuries in the accident and later medical evidence discloses that if Q had not moved S from the carriageway, S would not now be permanently confined to a wheel chair.

If evidence established that it was negligent for Q to attempt to move S off the carriageway by himself, particularly since Q could have warned oncoming motorists of S's presence, would Q be civilly liable for that negligence?

Assuming that Q was not affected by alcohol or drugs to the extent that his judgement was impaired and caused him to act without reasonable care, it is suggested that Q would (except in Queensland) receive statutory protection from civil suit. It is likely a court would not find such conduct on the part of Q to be a reckless disregard for S's safety. In Queensland, Q would not be protected from civil liability since Q is not a medical practitioner, nurse or other prescribed person and was not performing such emergency work in the course of duties for any prescribed entity that provides services to enhance public safety.

Example 6
V is employed on weekends by a Marine Rescue and Safety Authority to operate a launch for water rescues. V received payment from the authority on an hourly basis. The Marine Rescue and Safety Authority is a non-profit organisation and a prescribed entity under statute law formed to enhance public safety on water.

V receives a call from the authority's communication base to attend a boat in distress and is given the location of the boat. Due to careless navigation by V (a trained marine pilot) he does not find the distressed boat until it is sunk. V rescues the occupants of the vessel. Later evidence discloses that had V not carelessly navigated his way to the distressed boat he would have arrived in time to take action which would have prevented the vessel from sinking. The owner of the sunken vessel sues both V and the authority.

{Since V is paid for the services he provides, this would exclude the operation of "good samaritan" provisions in most of the States and any such liability of V may [in most States] facilitate recovery against the organisation employing V under vicarious liability principles.

However, V would receive statutory protection from civil liability in Queensland since he is performing duties for a prescribed entity that provides services to enhance public safety and the conduct of V would not qualify as a reckless disregard for the safety of those in distress. Neither could the organisation employing V be sued in Queensland.)

VOLUNTARY COMMUNITY WORK[6]

Legislative policy in this area seeks to give statutory protection to those engaged in voluntary work for community organisations.

Community work is work which is performed not for private financial gain and is for some charitable, sporting, recreational, political, educational or cultural purpose.There has been a deliberate attempt on the part of the various State governments to give a broad definition to what is regarded as community work in the public interest.

A person undertaking community work in good faith on a voluntary basis incurs no civil liability during the performance of that community work, providing it was either organised by a community organisation or the person was performing the voluntary work as an office holder of such a community organisation. The legislation therefore does not give protection to a person undertaking voluntary community work not organised by some community organisation unless the person is performing the work as an office holder of such an organisation. Consequently, the legislation offers no incentive to individual works of charity or philanthropy not linked to some community organisation.

Under the legislation community work is still performed on a voluntary basis where a person receives reimbursement for their reasonable expenses incurred in such work or even where

[6] Civil Liability Act 2003 (Qld) ss38-44; Civil Liability Act 2002 (NSW) ss59-66; Wrongs Act 1958 (Vic) Part IX ; Civil Liability Act 2002 (Tas) ss44-49; Volunteers Protection Act 2001 (SA); Volunteers (Protection from Liability) Act 2002 (WA); Volunteers Protection Act 2003 (Cwth); Personal Injuries (Liabilities and Damages) Act 2003 ss7-10; Civil Law (Wrongs) Act 2002 (ACT) s9.

they receive remuneration less than that prescribed for such work (the latter, a recognition that persons often perform community work for nominal rewards).

A community organisation maybe a corporation, trustee, church or religious group, registered political party, or public or other authority such as the crown, local government authority or some other statutory authority.

A volunteer is not given statutory protection when undertaking community work where:-

- His or her conduct constituted an offence;

- The volunteer was intoxicated by liquor or a drug and thereby acted carelessly;

- The volunteer knew, or ought reasonably to have known that he or she was acting

  (a) outside the scope of activities authorised by the community organisation, or

  (b) contrary to instructions given by the community organisation.

- The liability of the volunteer is a liability that is required under a written law of the state to be insured against;

- The liability of the volunteer is covered by compulsory third party insurance relating to the use of a motor vehicle;

- The liability is for defamation.

Interestingly, under Commonwealth and various State civil liability legislation,[7] while a volunteer performing community work receives statutory protection from civil liability, any such liability (of the volunteer) is transferred vicariously to the organisation for whom the volunteer is engaged. The policy behind imposing a vicarious liability on the organisation strikes a balance between protection of volunteers in serving the community, but not denying the right to the victim of negligence to sue the community organisation for damages, the latter being better placed to protect against and absorb the liability cost. In other States,[8] where there is no statutory vicarious liability, it may be possible to sue the community organisation under common law principles for the acts or omissions of the volunteer.

Example 7
Q is a volunteer working for a charitable organisation. Q's task is to supervise groups of disabled children on various outings such as picnics, visits to museums, and other places of interest. Q receives reimbursement of his expenses in caring for the children. Q is allocated by the charitable organisation a group of 10 children to escort and supervise on a picnic to a rural location. During the picnic, Q carelessly fails to notice that one of the children is wandering away from the picnic ground. This child becomes lost and cannot be found when a head count is performed at the conclusion of the picnic. The missing child is located 48 hours later, having suffered both physical and mental harm.

Q is protected personally from any civil liability arising from this incident, providing he was acting in good faith and was not under the influence of alcohol or a drug during the picnic and was not acting contrary to any instructions given by the organisation.

The organisation itself could be held vicariously liable for Q's negligent conduct. Furthermore, there may be a direct liability on the organisation if it was negligent to organise a picnic for 10 disabled children with only one carer.

In the above scenario, if Q had been specifically instructed by the organisation to have a group of 4 children only to supervise at any one time, and Q had disobeyed this instruction by taking a group of 10 children, then Q would not receive statutory protection from civil liability.

Example 8
A charitable trust whose mission is to support research into the treatment and prevention of skin cancer organises an annual doorknock. S is a volunteer collector in the annual appeal. S is designated by the organisation, a busy suburban area to doorknock for donations. S decides to ride his bicycle while collecting and while riding at high speed on the footpath collides with a pedestrian causing serious injury to the latter.

S would not be protected from civil liability due to the act of riding the bicycle on the footpath, constituting an offence. In the above scenario, if S was riding his bicycle on the road while collecting for the appeal and due to intoxication was negligent in controlling the

[7] Vic;SA;WA (NT;ACT)
[8] Qld;NSW

bicycle and thereby caused a collision, the result would be the same. S would be subject to civil liability owing to the intoxication.

EXPRESSION OF REGRET[9]

An initiative, uniformly adopted in the civil liability statutes, is to prevent an expression of regret or apology for some incident causing personal injury, being construed as an admission of liability.

The legislation draws a distinction between benevolence and sympathy and a strict admission of liability *per se.* An "expression of regret" is an oral or written statement expressing regret or apology for the incident to the extent that it does not contain an express admission of liability.

The legislation makes inadmissible in evidence any expression of regret in a civil proceeding. In some States, a statement of regret is only inadmissible if made before a civil proceeding is commenced.

Example 9
A religious body, which conducts private schools and employs teachers within these schools has received complaints from a number of past students who attended a particular school run by the religious body. There complaints particularise sexual misconduct by a specified teacher with each of these students and the physical and mental harm they have suffered as a consequence. The trustees of the religious body write to each of the students expressing regret and apology for the harm they have suffered ensuring them that the matter will be fully investigated. Subsequently, two of the students commence civil proceedings for damages against the religious body. The letters sent by the trustees of the religious body would be inadmissible in the civil proceedings and cannot be construed as an admission of liability.

[9] Civil Liability Act 2003 (Qld) ss70-72; Civil Liability Act 2002 ss67-69; Wrongs Act 1958 (Vic) ss14I-14J; Civil Liability Act 1936 (SA) s75 ; Civil Liability Act 2002 (WA) ss5AF-5AH; Personal Injuries (Liabilities and Damages) Act 2003 ss11-13; Civil Law (Wrongs) Act2002 (ACT)ss11A-11C

CONCLUSION

Civil liability reform in Australia has extended to the non-profit sector providing statutory protection in certain circumstances from civil suit for organisations and individuals engaged in community and philanthropic work.

Legislative initiatives aimed at legal protection for non-profit organisations and community workers, achieve two favourable results for governments: firstly, a potential reduction in the volume of litigation and the financial risk to the non-profit sector. This may further result in such organisations paying a realistic premium for liability insurance, or more importantly, at least having access to such insurance and the prospect of continuing their operations. Secondly, the deterrent effect of participating in community and charitable work under threat of litigation for negligence is removed, thereby providing an incentive both to individuals and to organisations to engage in community work. Consequently, such legislation is welcome and clearly serves the public interest.